Supreme Court of the United States.

October Term, A.D. 1907.

THE LOUISVILLE TRUST COMPANY,

Appellant,

against

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY AND OTHERS,

Appellees.

By parol The Louisville Trust Company

BRIEF IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI.

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE LOUISVILLE TRUST COMPANY,
Appellant,

vs.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY, and others.
Appellees.

Brief in Opposition to Application for a Writ of Certiorari.

This is an application by the Louisville Trust Company for a writ of *certiorari* to the Circuit Court of Appeals for the Seventh Circuit, to review a decree of that court affirming a decree of the Circuit Court for the District of Indiana foreclosing certain mortgages.

The application is made by one who, as the record shows, was never made a party complainant or defendant, and not only never filed a pleading in the cause but never asked leave to file one.

The application should be denied because:

1. The questions are not of that gravity and importance which justify the interposition of this Court.

2. The petitioner is not in a position to raise any of the questions referred to in the petition and supporting brief.

3. There is no merit in any of the contentions of petitioner.

Statement.

On August 24, 1896, John T. Mills, Jr., obtained a judgment in the Circuit Court of the United States for the District of Indiana against the Louisville, New Albany and Chicago Railway Company. Execution thereon was issued and upon its return unsatisfied, Mills filed a creditor's bill in the same court and moved for the appointment of a receiver. A receiver was appointed (*Record*, pp. 2, 10).

In view of the statements of the petitioner that this was a "prosperous railroad company" which "had never made a default in payment on its mortgage bonds," reference may properly be made to the allegations of the Mills bill, none of which have ever been denied.

That bill alleged, among other things, that the floating indebtedness of this "prosperous" company, including the Mills judgment of $494,911, was nearly $1,000,000, to which should be added the alleged liability as guarantor of the Beattyville Company's bonds, making the total floating debt nearly $2,600,000 (*Record*, pp. 4–6).

It also alleged that the Beattyville Company's railroad had never been completed; that the Beattyville Company was insolvent; that the entire Beattyville property was insufficient to pay construction liens ahead of the mortgage; that the Louisville, New Albany and Chicago Company had no resources with which to pay its unsecured debts except the surplus earnings from its road which would remain after paying its fixed charges of $1,200,000 a year; and that depression in business had greatly diminished the earnings (*Record*, pp. 5, 6, 7).

At the outset the court of its own motion made an order requiring the Receiver to file a report within twenty days, showing the obligations of the defendant Railway Company, secured and unsecured, when payable, and whether, after paying operating expenses the interest could be paid on the mortgage bonded debt as it matured, so as to prevent default (*Record*, p. 13). The Report does not appear in the record, but it was in fact filed, and this Court will presume that the Report was made in compliance with the order and that the court was satisfied that payment of the interest on the bonded debt was impossible.

Thereafter the Farmers' Loan and Trust Company and the Central Trust Company of New York, with their associate trustees,

filed their several bills in the same court to foreclose the three mortgages described in the bills *(Record*, pp. 20, 58, 107*)*. Each of the bills alleged insolvency, demand for interest and default; and that the Receiver appointed on the Mills bill was in possession of and operating the mortgaged property.

On November 12, 1896, the two foreclosure bills then on file were by order of the court consolidated with the Mills bill *(Record*, pp. 97, 98*)*, and on December 21, 1896, the third foreclosure suit was also consolidated with the other consolidated suit *(Record*, pp. 145, 146*)*.

On December 24, 1896, the Farmers' Loan and Trust Company and John H. Barker, as trustees, filed an amended and supplemental bill relative to certain branch properties *(Record*, pp. 146, 147*)*, and thereafter the two branch companies were made defendants *(Record*, p. 160*)*. On the motion of the trustees the court extended the receivership in the Mills suit to the consolidated cause.

The several defendants answered the several foreclosure bills but did not put in issue any of the material allegations of the bills *(Record*, pp. 163-165*)*. The various defendant trustees also answered, admitting the allegations of the several foreclosure bills *(Record*, pp. 165, 166*)*.

Hence, on January 23, 1897, the pleadings of all the parties defendant to the foreclosure bills being on file and there being no material allegations of said bills in issue or denied, and no proofs being required in order to authorize the entry of a decree of foreclosure and sale, application was duly and regularly made to the Court for such decree upon bills and answers.

On the same day the Louisville Trust Company filed an intervening petition *(Record*, pp. 166-168). This petition set forth facts tending to show only that the petitioner was a general creditor of the Louisville, New Albany and Chicago Railway Company, and prayed that it might be authorized to appear on its own behalf and on behalf of all others holding similar claims and take such steps and proceedings as it might be advised by counsel. *It did not contain a single allegation tending to controvert any allegation of any of the foreclosure bills and offered no issue upon any point embraced in those bills.* No answer, demurrer or other pleading of any description was tendered to the Court and no application made for leave to file any pleading.

The Court made an order that the Louisville Trust Company and the Kentucky National Bank might be admitted to appear in the proceedings in the cause, each on its own behalf *(Record*, p. 166*)*, and at the same time made and entered the decree of foreclosure and sale *(Record*, pp. 168-188).

The decree adjudged that all the material allegations of the foreclosure bills were true and directed foreclosure of the several mortgages and a sale thereunder. It made express provision for the payment of receiver's indebtedness and of any claims which might be adjudged to be prior in lien to the mortgages foreclosed, reserving the right to retake the property in case of the failure of the purchaser to comply with any order of the court in respect thereto *(Record*, pp. 185, 186*)*. It also adjudged that all questions not thereby disposed of should be reserved for future adjudication, and the court reserved "full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same."

On February 27, 1897, thirty-five days after the entry of the foreclosure decree, the Louisville Trust Company filed a second petition *(Record*, pp. 189-198*)*. This was filed without prejudice to the right of the complainant to move to strike the same from the files *(Record*, p. 189*)*. This petition contained various charges and allegations tending to negative the right of the trustees to foreclose their mortgages, and prayed that the decree of foreclosure and sale be set aside, that the mortgages should be declared to be invalid, and that the assets of the railway company should be ascertained and the same distributed among general and unsecured creditors. It also prayed that an order should be entered commanding some of the parties to the consolidated cause, but not all, to appear and plead to the allegations of the petition.

No such order to plead was ever made, and it does not appear by the record that any application for it was made, except only by filing the petition.

No showing or excuse of any kind was made for not setting up these alleged defenses before the entry of the decree of foreclosure, and even this petition did not ask leave of the court to interpose any answers or demurrers to the bills.

On March 9, 1897, the day before the day fixed for the sale under the decree, this petition came on to be heard, and the court refused to vacate the decree of foreclosure or to postpone the sale *(Order, Record*, p. 198*)*.

The sale was made to the bondholders' committee, and on the same day application was made to confirm the sale and the Master's report. All the parties to the foreclosure bill appearing and consenting, an order of confirmation was entered (*Master's report, Record*, pp. 199–201; *Order, Record*, pp. 201–203). The Louisville Trust Company filed its petition of appeal and assignment of errors. The appeal was heard by the Circuit Court of Appeals for the Seventh Circuit, and the decree was affirmed (*Opinion, Record*, pp. 217–223; *Order; Record*, p. 223). The Louisville Trust Company now applies for a writ of *certiorari* to review this decision.

ARGUMENT.

First. THE QUESTIONS PRESENTED BY THE PETITION AND THOSE DECIDED BY THE CIRCUIT COURT OF APPEALS ARE NOT OF THAT "PECULIAR GRAVITY AND GENERAL IMPORTANCE" WHICH THIS COURT HOLDS TO BE ESSENTIAL TO REQUIRE A REVIEW OF THE CONCLUSIONS OF THE CIRCUIT COURT OF APPEALS.

Lau Ow Bew, Petitioner, 141 U. S., 583.
American Construction Co. vs. R. R. Co., 148 U. S., 372.

It is not the gravity of the questions as affecting the petitioner nor the importance of the case with respect to the personal rights of the litigant, but it is the peculiar gravity of the questions and their importance to the general public, and the effect of the decision upon the general public and its interest which are to be taken into consideration.

"This must necessarily be so in any view, and especially when it is considered that the Circuit Court of Appeals was created for the express purpose of relieving this court of the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern and delayed suitors in the pursuit of justice."

In re Woods, Petitioner, 143 U. S., 202.

The Court upon such applications will confine its inquiries and consideration to the opinion and decision of the Circuit Court of Appeals, and will not go outside of such opinion to consider other

questions mooted by counsel. It will not consider or review the record or the errors assigned by counsel in argument, for otherwise this Court would be required to try the whole case on petition, and to again rehear it if the application should be granted.

The record involves the ordinary and usual questions arising in cases of foreclosure of railroad mortgages, and the petitioner's rights as a general creditor must depend alone upon the intervening petition of January 23, 1897.

One of the adjudged findings and conclusions of the Circuit Court of Appeals furnishes a complete answer to the application, viz. :

"The petitioner, after being allowed to file its petition, did not tender any issue or ask leave to file any answer or pleading, so that there was no occasion for the complainants to offer any evidence to substantiate the allegations of the bill, but a decree of foreclosure was regularly and properly rendered upon the bill and answers. Now the appellant comes to this court and asks for all the benefit and advantage that it might have had if it had asked and obtained leave to put in an answer and had produced evidence to defeat the equities of the bill. We know of no precedent for such a practice; it would be a travesty upon equity proceedings" *(Record*, p. 221*)*.

The record verifies this adjudged finding, which is not attacked on any ground whatever in the petition. Without such pleadings and without evidence the Circuit Court of Appeals was bound to affirm the decree. In this situation no question of "peculiar gravity and general importance" can arise, and neither the alleged errors complained of in the petition nor the argument in its support could avail if the cause were heard on an appeal by the petitioner.

We submit, however, that the questions presented by the petition have been repeatedly decided by this Court, and that the opinion of the Circuit Court of Appeals in the disposition of these question is in full accord with those decisions.

It is implied in the brief of petitioner's counsel (pp. 11, 12) that because this Court has granted a writ of *certiorari* to review the decision of the Circuit Court of Appeals for the Sixth Circuit, holding the Louisville, New Albany and Chicago Company liable on the guaranty of the Beattyville bonds, this Court should do the like in this case. But that is a complete *non sequitur*. The questions in the two cases are utterly different. There is no logical or legal similarity between them.

Second. THE PETITIONER HAS NO STANDING TO ASSERT ANY OF THE OBJECTIONS TO THE FORECLOSURE WHICH ARE SET FORTH IN ITS PETITION.

I. It was contended below that, the cause being a consolidated cause, the court could not render a decree of foreclosure until the whole case was ready for final decree; and that, if the Mills suit was not ready for decree, it was not proper to render a decree on any of the bills. This proposition cannot be sustained.

The consolidation was made in pursuance of the provisions of the Revised Statutes of the United States, Section 921.

In *The Mutual Life Ins. Co. vs. Hillman*, 145 U. S., 285, where several suits had been consolidated under this statute, the Court say:

"But although the disputants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remain distinguished and require separate verdicts and judgments."

In *Continental Trust Co. vs. Railway Co.*, 82 Federal Reporter, 645, the Circuit Court of Appeals for the Sixth Circuit considered the effect of a consolidation of a creditor's suit with foreclosure suits, and say:

"Such dependence does not throw both suits into hotchpot and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Because the *res* acquired under the original bill gives ancillary jurisdiction to entertain a dependent bill seeking relief in respect to the *res*, parties to the original bill are not thereby made parties to the dependent bill. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction thereof. Hence the rule as to who may appear to a foreclosure bill and file answers is the same here as if the bill had, in fact, been an independent bill."

Under this rule the foreclosure suits were brought to hearing. The intervening petition filed on the same day did not attack or challenge any of the proceedings in the foreclosure suits, nor the validity of the bonds and mortgages; offered no objection to the entry of the foreclosure decree, and presented no excuse or ground for delay of such entry. It rested upon the bare assertion that petitioner holds bonds of a Kentucky railway company, upon which had been endorsed guarantees for payment by the Louisville, New

Albany and Chicago Railway Company, with a prayer that it might be permitted to file the same and take such action in relation thereto as it might be advised.

II. If petitioner, a general and unsecured creditor, were entitled to assert any defense whatever against these bonds and the mortgages securing the same (which is disputed), it was its duty to move the court for leave to present its defense by answer or plea. By failing to do so, it clearly waived any possible right to be heard to object to the foreclosure, either in the court of original jurisdiction or upon appeal, or in this Court on petition for *certiorari*.

The petitioner put itself before the court solely in the light of a general creditor seeking to reach any unmortgaged income or property, and its rights in that respect were fully protected by the decree of foreclosure *(Record*, p. 188*)*.

The proper practice with reference to pleading in such cases is indicated in *Toler vs. East Tennessee, Virginia & Georgia Railway Co.*, 67 Federal Reporter, 168. The complainants were not notified that there was any dispute as to the truth of the allegations of their bills, and were not called upon to wait for an indefinite period until the intervenor might choose to present his pleading to the court.

III. The petition of February 27, 1897, cannot be considered, because it was made long after the decree had been entered and filed. The application based upon it was addressed to the favor of the court and was not a matter of right.

IV. The petitioner did not have or assert any lien on the mortgaged premises. Having no lien, it was neither a necessary or proper party to the foreclosure bills.

Bronson vs. Railway Co., 2 Black, 524.
Herring vs. Railway Co., 105 N. Y., 340.
Jones vs. Winans, 20 N. J. Equity, 96.
Stout vs. Lye, 103 U. S., 66.

Third. THERE WAS NO MERIT IN THE OBJECTIONS SET FORTH IN THE SECOND PETITION OF THE LOUISVILLE TRUST COMPANY.

I. The petitioner did not question the fact that the bonds secured by the mortgages were made in good faith and for a valuable consideration and were in the hands of *bona fide* holders. The

objections were, in substance, that when the bonds and mortgages securing them were executed, the mortgagor company had no legal existence, because neither Indiana nor Illinois, in which the constituent companies were incorporated, had, by law, authorized the consolidation by which the mortgagor company was formed; and that under one of the mortgages there could be no foreclosure until six months after default.

The Circuit Court of Appeals, in deciding the case, said:

"The sole ground of objection to the complainant's case, in the court below, as set forth in petition of appellant, and which was filed after the decree was taken and which was addressed to the discretion of the court asking to have the decree set aside, was the total invalidity of the bonds and mortgages."

Record, page 221.

It is now asserted by counsel that the court did not consider the alleged premature filing of one of the foreclosure bills.

If counsel thought that the court below had overlooked any point, it was his duty to have applied for a rehearing on that ground.

This he has not done.

But doubtless the court did not discuss the matter in its opinion, because the objection was of no materiality or importance.

Covenants of this description have been frequently construed, and we find no reported case where they have been held to prevent a foreclosure in equity.

A covenant for six months' possession by a mortgagor after default before a right of entry and sale accrues cannot be availed of by a stranger to the mortgages. It is for the benefit only of the grantor and its assigns.

Guaranty Trust Co. vs. Railway Co., 139 U. S., 143.

In any view touching either a technical or liberal effect to be given to such a covenant, the moment a receiver was appointed in a proceeding adverse to the mortgagor and the mortgaged property had passed into the custody and control of such receiver, the trustees and bondholders were wholly relieved from the operation of the covenant and it became inoperative. The effect of the appointment of a receiver upon a judgment creditor's bill was to remove the income and earnings out of the reach of the bondholders. The rule is well settled that the

income and earnings derived from property put in the hands of a receiver at the suit of a judgment creditor cannot be appropriated for the benefit of a mortgagee, notwithstanding the express recital in the mortgage that such income and earnings are made subject to the mortgage lien and are to enure as part of the mortgage security to the benefit of the bondholders. In order, therefore, to bring the income within the mortgage, it was necessary for the mortgagee to file a bill and have his receiver appointed thereon.

See *American Bridge Co. vs. Heidelbach*, 94 U. S., 798.
Railway Co. vs. Cowdrey, 11 Wallace, 459.

These cases show the right and duty of the trustees to have the immediate appointment of a receiver, in order to reach the income and earnings applicable to the mortgage security, thereby preventing them from being taken away from both mortgagor and mortgagee and applied to the benefit of a junior judgment creditor.

It is quite manifest that it would be entirely inequitable to require the trustee to stand idly by for six months after default and allow the security of his *cestuis que trustent* to be absorbed by a junior judgment creditor. Any trustee neglecting to proceed under such circumstances would be derelict in duty.

The right of the trustee to proceed at once under mortgages quite similar in terms to those involved in this suit has been sustained by the courts.

Mercantile Trust Co. vs. Chicago, Peoria & St. Louis Railway Co., 61 Federal Reporter, 372.
Farmers' Loan & Trust Co. vs. Chicago & Northern Pacific R. R. Co., 61 Federal Reporter, 543.

II. It was asserted in the second petition that the bondholders and stockholders of the New Albany Company entered into an arrangement and agreement for the purpose of procuring a sale of the property without the payment of the liabilities of the company (*Record*, p. 193). There is nothing in the way of proof of this allegation, and of course it cannot be considered. If the bonds were valid the enforcement of the mortgages securing them, which would of necessity have cut off floating creditors and subsequent lien holders, would be neither illegal nor fraudulent. If the bondholders had a legal right to collect their debts by foreclosing the mortgages, they could not expose themselves to liability by exercising that

right, and an allegation that it was done with fraudulent intent and purpose would amount to nothing.

McLean vs. King, 144 U. S., 260.

Allegations are contained in the second petition that the Mills bill was filed for the purpose of hindering and delaying the general and unsecured creditors *(Record*, p. 192*)*, and that the bills to foreclose were filed for the same purpose. The case of *Continental Trust Co. vs. Toledo, St. Louis & Kansas City R. R. Co.*, 82 Federal Reporter, 642, is cited to support the contention of the petitioner. In that case the court says of like attacks by intervening creditors :

" They [the intervening creditors] have no standing in court at all to take part in the distribution of the assets of the defendant debtor, save as they accept the tender of the benefit made to them by the complainant in his bill. If they would be independent of this restriction they are at liberty to put their claims in judgment, and after a *nulla bona* return to file a creditor's bill of their own against any defendants they may select, and under it they may dispute all other claims. But, so long as they owe their right to be in court at all to the sufficiency of the averments of the bill for the relief asked, they cannot be heard to question the very basis upon which alone the court can act."

If the charges made by the petitioner against the Mills judgment were true, then under this rule petitioner would have no standing whatever in court ; but in the case cited the court disposes of this question by saying :

" *Undoubtedly an intervening creditor may not defeat the judgment claim of the complainant upon which the bill is founded and the court obtains jurisdiction.*"

In the case last cited, the right of the intervening petitioner to challenge the bonds was put upon the sole ground that the *bondholders themselves* were parties to the creditor's bill, and that the assailing creditor had intervened under the same bill. The court says :

" In a hearing on a creditors' bill any creditor making himself a party by presenting a claim may be heard to contest the claim of every other creditor seeking payment out of the estate of the debtor. * * * I can see no reason why any creditor intervening in this action under the creditors' bill may not attack the claim of any other creditor seeking the benefit of that bill. The bondholders have

made themselves parties to the creditors' bill by a committee of their number, and have set up their claims and lien."

But the court did not hold that a general creditor could intervene in the foreclosure suits and attack the validity of the bonds and mortgages in those suits.

Nor did it hold that a general creditor, who had intervened without questioning the rights of the bondholders, could, after decree of foreclosure and sale, be heard to attack the bonds and mortgages, no intimation of any intention to do so having been given in any manner prior to the entry of the decree.

III. The contention that the mortgages were void because the consolidated corporation had no legal existence is without merit.

The petitioner's alleged claim is based upon the simple contract of the consolidated corporation, and it occupies the absurd position of insisting that the consolidated corporation could make a valid guaranty of the debt of another corporation, but could not create a debt of its own.

If the bonds were null and void because the consolidated corporation had no legal existence, then the debt of the petitioner is in no better condition, and the Court has nothing upon which to exercise jurisdiction.

Continental Trust Co. vs. Toledo, Kansas City & St. Louis Railway Co., 82 Federal Reporter, 642.

Even if the validity of the consolidation were in issue and on trial in the Illinois court, the effect of the decision in *American Loan & Trust Co. vs. Railway Co.*, 157 Ill., 641, has been entirely destroyed by the curative act of the Illinois Legislature, approved and in force July 9, 1897, which ratifies and confirms all railway consolidations affected by that decision.

See Statute, *post*, page 14.

Fourth. THE ORDER OF CONFIRMATION WAS REGULAR AND PROPER.

All parties consented to the confimation, and the appellant was not a party entitled to notice. The provisions of Equity Rule 83 do not apply.

Pewabic Mining Co. vs. Mason, 145 U. S. 349.

There was no occasion for an order *nisi*. All the parties were before the court and not objecting. The only object of requiring the report to be confirmed is to afford time, between the service of the order *nisi* and confirmation, for others to come in and open the bidding, so as to secure the sale of the estate to the best possible advantage. It is not suggested that there was any one in existence who would have made a higher bid.

Fifth. The proceedings in this case were not conducted secretly; they were matters of public notoriety. No step was taken in the foreclosure suits in advance of the time when, under the rules, the complainants were entitled to proceed. The petitioner, by refusing to proceed in an orderly way, furnishes good reason for the conclusion that its object was not in good faith to procure an adjudication of the merits of the alleged case, but to obstruct and impede the secured creditors in a just and reasonable effort to reorganize an insolvent and defaulting railway corporation.

The learned counsel seems to think that some wrong or injustice was perpetrated, because the law was administered "speedily and gently" (see his *Brief*, p. 13).

The in erence is that he thinks the proceedings should have been dilatory. The objection that proceedings in a court of equity have *not* been allowed to drag for long periods has not often been heard.

There is no legal reason why a mortgage upon a railroad should not be foreclosed as speedily as a mortgage upon an ordinary piece of property, and we know of no rule of law which entitles the creditor of a railway company to assume that such mortgages will not be foreclosed promptly where no defenses have been interposed.

Sixth. The prayer of the petition for a writ of *certiorari* should be denied.

ADRIAN H. JOLINE,
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Of Counsel for Appellees.

Illinois Statute of June 9, 1897.

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every agreement, whether in form of deed of sale, articles of consolidation, or otherwise, made and entered into between the first day of July, in the year Anno Domini one thousand eight hundred and seventy-four, and the first day of July, Anno Domini one thousand eight hundred and eighty-three, by and between any railroad company organized under the laws of this State or of this State and any other State or States, and any railroad company or companies organized under the laws of any other State or States, providing or purporting to provide for the consolidation or merger of the capital stocks, corporate and other franchises, privileges and property of the respective companies parties thereto, and under which the consolidated company thereby created or attempted to be created, or its successor or lessee, now owns, controls or operates, or is in possession of, the several railway lines of the respective companies, parties to such agreement, be, and the same is hereby, ratified, approved and confirmed; and all the corporate rights, franchises, privileges and immunities of the several and respective companies, parties to every such agreement, are hereby granted, vested and confirmed in the consolidated company thereby created or attempted to be created for and during the term of its corporate existence and of any renewal thereof.

Laws of Illinois (Bradwell), 1897, pages 198, 199.